is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.** – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) **Claim defined.** – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure.** – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims.

(b) **Actions by private persons.** (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written

consent to the dismissal and their reasons for consenting.

STATEMENT OF THE CASE

In 1991 the United States Army made a decision to purchase 85,488 Family of Medium Tactical Vehicles ("FMTVs") to replace its aging medium truck fleet. *Army Medium Trucks: Information on Delivery Delays and Corrosion Problems*, GAO/NSIAD-99-26 (January 1999). This major acquisition program consisted of prototype and production phases. *Audit Report: Contractor's Performance On The Family Of Medium Tactical Vehicles Program*, OIG Report No. 96-020 (Nov. 1, 1995). Three companies, including respondent Stewart & Stevenson Services, Inc. ("S&S"), were awarded contracts to develop FMTV prototypes. On October 11, 1991 the Army awarded the FMTV production contract to S&S. This contract was a $1.2 billion, 5 year fixed-price contract for the first 10,843 trucks.

The FMTV contract specified that, at a minimum, the FMTVs were to be manufactured to preclude corrosion from perforating or causing other damage requiring repair or replacement of parts during the FMTV's initial ten years of service.[1] The method of testing the contract-mandated minimum ten year corrosion-free service life was made an explicit term of the FMTV contract. This testing method required S&S to conduct an accelerated corrosion test ("ACT") whereby 200 test cycles of 18 hours duration are required to provide the equivalency of a ten year corrosion-free service life.

[1] Article 3.2.2.3.2 of the contract states that more than ten years corrosion-free service life is desired and requires a total service life of twenty years.

Prior to the award of the production contract, respondents were sent a Government report indicating that galvanized steel was necessary to provide the ten year corrosion-free service life required by the contract. Although the other two bidders produced prototypes with galvanized steel cabs, S&S utilized a cab manufactured by respondent McLaughlin Body Co. ("MBC") made of cold rolled or "mild" steel with some galvanized elements. Respondents knew that "mild" steel was insufficient to meet the contract mandated ten year corrosion-free service life. In fact, prior to production, MBC's President and Vice President, urged S&S to use galvanized cabs. They did so because they knew that a ten year corrosion-free service life was a contract specification, and they doubted that non-galvanized steel cabs could satisfy that requirement. Use of galvanized cabs would have added approximately $25 to the cost of the cab. Nevertheless, despite Respondents' knowledge that non-galvanized cabs could not meet the Army's anti-corrosion specifications, MBC agreed to produce non-galvanized steel cabs for S&S to incorporate into the FMTVs.[2]

Every time it shipped cabs to S&S, MBC certified in writing that:

> The undersigned, individually, and as the authorized representative of the contractor, warrants and represents that: All the information supplied above is true and accurate; the material covered by this certificate conforms to all contract requirements including, but not limited to the drawings and specifications; the analyses appearing herein are true and accurate analysis: And this certificate is made for the purpose of

[2] MBC is the sole source of cabs for the FMTVs. S&S is the sole supplier of FMTVs to the Army.

> inducing payment and with knowledge that the information and certification may be used as a basis for such payment.

Appendix A-31-32.[3] MBC also expressly certified conformance with the Army's contract specifications including TT-C-490[4] and MIL-STD-193K.[5] These specifications addressed metal cleaning procedures and metal painting procedures designed to prevent corrosion.

Although the ACT was to have been concluded in May 1994, it was not completed until August 1995. The selected FMTV failed the ACT. Additionally, on August 25, 1995 during the tear down of an FMTV for retrofit to correct other problems, S&S discovered that the cab possessed a "SERIOUS, SERIOUS corrosion problem." Appendix A-32 (emphasis in original). Inspections revealed that hundreds of the FMTVs manufactured by Respondents were corroded. These vehicles were less than three years old.

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[3] The MBC subcontract with S&S specifically required certification that the cabs met the specifications of S&S's contract with the Government.

[4] TT-C-490 requires that as a result of cleaning, all parts are to be thoroughly free of oil, grease, wax, dirt, scale rust, and other foreign matter and should show no visible signs of corrosion products when tested. TT-C-490 also requires that the cleaned parts be subjected to certain rinses and treatments and that they undergo a final chromic or non-chromic rinse. It is undisputed that MBC's manufacturing process violated these requirements.

[5] MIL-STD-193K requires that prior to any treatment or painting, all surfaces must be free of corrosion or oil or any other foreign matter that might interfere with treatment or painting. MIL-STD-193K also requires that the area of painting be clean and rust free. 193K further mandates that primer be applied within 24 hours of surface treatment and that paint be grit-free, smooth, with no streaks, pinholes, craters, etc. Despite its certifications of compliance, MBC's manufacturing process violated these requirements.

After the corrosion problem was discovered, the Army informed S&S that until the root causes of corrosion had been addressed, vehicle acceptance of any kind was suspended. The Army further informed S&S that the suspension would only be lifted after S&S conducted a root cause analysis of failed components (stored vehicles as well as test vehicles), presented a satisfactory corrective action plan for current inventory as well as future production, and submitted the ACT report.

Petitioner was placed in charge of preparing the report on the root cause of the corrosion. He and other S&S employees conducted audits of both Respondents' facilities. A November 1995 audit of MBC revealed for the first time that MBC had engaged in numerous significant violations of the Army's contract specifications that either caused or contributed to the corrosion. Another audit at MBC in December, 1995 revealed similar deficiencies. Among the violations discovered were: (1) corroded parts on the weld line; (2) corroded parts being reworked by sanding on a routine basis; (3) inspection procedures for reworked parts not described by clear, complete, and current instructions; (4) no process control procedures available for pretreat cleaning stages where oil and other contaminants were to be removed from stampings prior to welding; and (5) the temperature gauge for monitoring the wash system was not calibrated.

Additional violations uncovered by the audits of MBC's processes included the fact that MBC had unilaterally removed a contract mandated non-chrome rinse from its post-treatment process. This rinse, which MBC eliminated without approval by S&S or the Army, improved corrosion resistance. Although MBC was not permitted to make process changes unless it obtained written governmental approval, MBC never sought or obtained such approval prior to removing this rinse from its process.

After MBC's unilateral removal of the anti-corrosion rinse was uncovered, MBC claimed that the changed procedure was as good as the originally approved but abandoned procedure and requested approval to continue with the procedure it had unilaterally implemented. This request was denied.

The audits of MBC also revealed that cab panels that had not yet been cleaned had stage 2 corrosion apparently caused by water dripping from the warehouse ceiling. MBC employees attempted to remove the corrosion by improperly sanding the metal without taking measures to neutralize the corrosion. Additionally, MBC employees sanded cabs that had been e-coated and top coated, a process that completely removed the protective coatings leaving only bare metal. This sanding was determined to be a cause of the widespread corrosion that was found at MBC.

The subcontract between MBC and S&S required MBC to conduct testing of its processes and parts. Petitioner discovered that MBC was using laboratory coupons to test its system which had no correlation with actual parts MBC processed. While Petitioner was conducting tests at MBC, an MBC manager tried to force Petitioner to conduct a coupon test in a way that would bias the test in MBC's favor. Petitioner refused.

Petitioner's investigation also revealed that S&S's manufacturing process was being operated in violation of the contract mandated TT-C-490 specification. S&S was placing different size parts though its e-coat process simultaneously. Because this process is time, temperature, and concentration sensitive, mixing different size parts resulted in poor e-coating and in products that failed S&S's corrosion prevention obligations.

Petitioner concluded that MBC's process was "out of control," a term of art used by corrosion experts to describe a process not capable of producing parts compliant with contract specifications. After Petitioner presented his findings at a meeting of S&S managers and local Government representatives, S&S's Executive Vice-President chastised Petitioner for reporting that MBC's processes were out of control and that neither Respondents' systems were capable of meeting contract requirements. He told Petitioner that he must say that "the systems were only bad some of the time." Petitioner replied that he was not going to lie about the problems he discovered. When Petitioner refused to lie, he was removed from being in charge of the corrosion investigation and from the preparation and presentation of the final report to the Government.

On January 19, 1996, the Army agreed to accept trucks with MBC cabs if S&S: (1) repaired or replaced cabs that showed corrosion, (2) agreed to a corrosion test of two repaired cabs to verify the repairs, and (3) agreed to repair or replace cabs if corrosion appeared on them within five years. Following the implementation of this agreement, the Army tested the corrosion repairs made on two cabs. The cabs failed the corrosion repair test.

On August 29, 1996 the Army's Contracting Officer wrote S&S criticizing S&S's lack of compliance in supplying required reports regarding corrosion testing and corrective actions, and indicated that "preliminary test data . . . indicate that cabs subject to S&S's repair procedures demonstrate less corrosion resistance than cabs manufactured to the original production procedures." On September 25, 1996, the Army informed S&S that it would no longer accept trucks with repaired cabs.

To convince the Army to allow it to again deliver FMTVs with repaired cabs, S&S proposed a ten year corrosion warranty on FMTV cabs, cargo beds, frame rails, and crossmembers produced through February 28, 1997. FMTVs produced after February 28, 1997 were not covered by the corrosion warranty. The February 28, 1997 cut off for the proposed warranty was based upon Respondents' false representation to the Government that MBC had changed its manufacturing process after that date to rectify the corrosion problems. The proposed warranty limited S&S's liability for repairs to $10 million. Replacement of the defective cabs would have cost over $31 million.

On November 13, 1996, after Petitioner had filed his FCA case, the Army and S&S implemented a contract amendment that incorporated the partial warranty proposed by S&S for vehicles produced prior to February 28, 1997, and the Army resumed accepting trucks with corrosion repairs. Nothing contained within the contract amendment indicates the amendment was intended to "settle" or release any claims the Government had against S&S or MBC.

The final 3,751 trucks were manufactured with galvanized steel cabs for which the Army paid an additional $7 million. No corrosion warranty was provided for the 2,491 FMTVs produced after February 28, 1997 but prior to the conversion to galvanized steel cabs. Nor were these cabs subjected to any testing. Thus, 7,446 FMTVs were delivered to the Army, none of which has ever been shown to meet the ten year corrosion-free service life the Army bargained for in the FMTV contract.

ARGUMENT

A. The Court Of Appeals Decision Requiring An Express Certification Of Compliance With Every Provision Of A Federal Contract Before FCA Liability Can Attach To Claims For Payment For Nonconforming Goods Submitted To The Government Is In Direct Conflict With The Sixth And Ninth Circuit Courts Of Appeals.

The Fifth Circuit found that summary judgment in favor of the Respondents was appropriate because:

> The claims S&S submitted to the Government were the progress payment requests and the Government-signed DD250. Neither expressly certified compliance with every provision of the overall contract.

Appendix A-9. In so holding, the Fifth Circuit placed itself in opposition to the Sixth and Ninth Circuits, each of which has held on more than one occasion that FCA liability is established, as Petitioner asserts, when a contractor knowingly supplies the Government with a product that does not conform to contract specifications and invoices the Government for payment. *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429-30 (6th Cir. 2001); *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001); *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 302-04 (6th Cir. 1998); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); *United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957). Under these holdings, the FCA is violated even if the product supplied is as good as what the contract required. None of these decisions from the Sixth and Ninth Circuits requires an express certification to the contract terms before FCA liability may be found.

In *Lee*, the Ninth Circuit made it clear that in the case of non-conforming goods for which a contractor bills the Government, no certification of any kind is required to establish FCA liability. The Court held:

> Neither false certification nor a showing of government reliance on false certification for payment need be proven if the fraud claim asserts fraud in the provision of goods and services.

245 F.3d at 1053. The rationale for these holdings is set forth by the Sixth Circuit in *Varljen* which held:

> "Parties that contract with the government are held to the letter of the contract – irrespective of whether the contract terms appear onerous from an *ex post* perspective, or *whether the contract's purpose could be effectuated in some other way* – under the maxim that '[m]en must turn square corners when they deal with the Government.'" *Midwest Specialties, Inc.*, 142 F.3d at 302 (emphasis added in original).

Varjlen, 250 F.3d at 430.

Most of the appellate decisions that are in conflict with the Fifth Circuit's decision rely upon an earlier decision of the Fifth Circuit in *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972) for the proposition rejected by the Fifth Circuit in the instant case. Although Petitioner also relied upon *Aerodex*, the Fifth Circuit's decision fails to address that opinion in any fashion. See Section C, *infra*. Nonetheless, while the Sixth and Ninth Circuits support the argument urged by Petitioner regarding nonconforming goods, the Court of Appeals for the District of Columbia in *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551 (D.C. Cir. 2002) has held that "the bare assertion that defendants delivered goods that did not conform to contractual specifications is not enough to state a violation of the FCA."

Because a conflict exists among the Courts of Appeals on this issue which is of paramount importance to a correct application of the FCA, this Court should grant *certiorari* to resolve the conflict.

B. The Court Of Appeals Decision Finding That Liability Under The False Claims Act Would Not Attach Where The Government Was Involved In The Design, Production, And Testing Of The Product Supplied And Where Modifications Were Negotiated Between The Government And The Contractor Is In Direct Conflict With Other Circuit Courts Of Appeals.

The Fifth Circuit's decision is premised upon its view that no FCA liability should be incurred if the Government was "involved in the design, production, testing, and modification of the FMTVs; and S&S and the Government negotiated contract modifications in response to the well-documented corrosion problem." Appendix A-9. This interpretation of the FCA puts the Fifth Circuit's holding in conflict with the Sixth Circuit's decision in *Varljen*, 250 F.3d at 426, and the Ninth Circuit's decision in *National Wholesalers*, 236 F.2d at 944.

In *National Wholesalers*, the contractor had contractually agreed to supply a particular brand of regulator, but instead had supplied an equal but different brand of regulator. After 4,086 regulators had been inspected and received by the Army, it was discovered that the brand was not that for which the Army had contracted. After testing showed the substituted regulator to be equal to the regulator specified, the Army's contracting officer sent the contractor a letter stating that the substituted regulator would be accepted as equal. After receipt of the letter, the contractor shipped an additional 2,514 regulators and

received payment for them. Subsequently, an FCA case was brought. The district court dismissed the claim finding that the goods were equal to these specified and that the dispute which had arisen had been resolved by the contracting officer.

The Ninth Circuit reversed and in doing so held:

> The court found that no claim was false. It is the opinion of this court that every one of the invoices prior to October 1, 1950, was false when made. The test of whether a claim is false must be as of the date when the claim is made. There might be an exception; it might be held that if midway in performance the contracting officer and the supplier modified the contract ab initio on some detail of no great consequence and agreed to accept for the whole performance an 'equal' that a court should say that the purpose of the False Claims Act was not to reach such a situation even though the claims had misdescribed the article. It is possible that such a modification was made here, but if so then we think such modification, so far as it runs backward, is void as against public policy. In such palming off as we have here we do not believe that the Congress ever intended that contracting officers should have the power to vitiate the False Claims statute.

236 F.2d at 950.

Similarly, the Sixth Circuit in *Varljen*, in reliance upon *Aerodex* has held that "The government's inspection and acceptance of a product do not absolve a contractor from liability for fraud under the FCA." 250 F.3d at 430. Additionally, the Sixth Circuit, in reliance upon *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) held that "the government's knowledge

of a fraud does not necessarily absolve a contractor from liability under the FCA." 250 F.2d at 430.

Because the opinion of the Fifth Circuit in the instant case conflicts with opinions of other Courts of Appeals on a matter of importance regarding fraud in government contracting, this Court should grant *certiorari* to resolve the conflict.

C. The Use Of An Unpublished Opinion By The Court Of Appeals To Circumvent The Ruling Of A Prior Panel Of The Same Court Raises Important Issues Under Article III And The Due Process Clause Of The United States Constitution Which Should Be Resolved By This Court.

At the time Petitioner filed suit, the law of the Fifth Circuit as expressed in *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972) was that knowingly billing the Government for goods failing to meet contractual specifications constituted a violation of the FCA irrespective of whether the billing was accompanied by a false certification of compliance with specifications. *Aerodex* also held that the Government's obligation to inspect would not absolve a contractor of FCA liability. 469 F.2d at 1009. As discussed in Sections A and B, *supra*, the *Aerodex* holding was adopted by the Sixth and Ninth Circuits. *Varljen*, 250 F.3d at 430; *Lee*, 245 F.3d at 1053. Although Petitioner relied throughout his appellate brief on *Aerodex*, the Fifth Circuit in its unpublished *per curiam* opinion, without reference to *Aerodex*, held, contrary to that opinion, that no FCA liability attached to the contractor because no express certifications of compliance with every provision of the overall contract were made and because the Government had knowledge of the corrosion and had entered into contract modifications addressing the defective product. Thus, in the Fifth Circuit, there are

now two opposite rulings on identical propositions of law–the published holding in *Aerodex* and the unpublished holding in *Stebner*.

The *Stebner* panel's use of an unpublished opinion to circumvent long standing precedent raises the specter of a complete and total abandonment of the rule of law, a pernicious practice recognized as such by a panel of the Eighth Circuit in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). In *Anastasoff*, the Eighth Circuit panel examined the constitutionality of its own local rule regarding unpublished opinions. The Eighth Circuit panel saw the doctrine of precedent, the duty of courts to follow their prior decisions, as a principle that the framers intended as a limit to the judicial power delegated to the courts in Article III of the Constitution. In the words of the Eighth Circuit panel:

> At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not *fiat*.

223 F.3d at 904.

Anastasoff was later vacated as moot by the Eighth Circuit sitting *en banc*. However, since its publication, the panel opinion has evoked considerable interest on the part of courts and legal scholars on the propriety and constitutionality of unpublished opinions. *See, e.g., Hart v.*

Massanari, 266 F.3d 1155, 1158-80 (9th Cir. 2001); *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227, 229-34 (Ark 2003); Lance A. Wade, Note, *Hondo Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citations to Unpublished Judicial Decisions*, 42 B.C.L. Rev. 695, 722, 731 (2001) (concluding that federal circuit courts' no-citation rules violate procedural due process); Jon A. Strongman, Comment, Unpublished Opinions, *Precedential Value and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. Kan. L. Rev. 195, 223 (2001) (concluding that limited publication rules violate the Fifth Amendment's due process and equal protection guarantees).

This Court has in the past criticized the use of unpublished opinions. For example, in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court in reversing a Court of Appeals decision involving First Amendment free speech issues held: "We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion." *Id.* at 425 n.3. Similarly, Justice Stevens, in *County of Los Angeles v. Kling*, 474 U.S. 936, 937, n.1 (1985) (Stevens, J. dissenting) criticized the Ninth Circuit's decision not to publish an opinion as "plainly wrong" and equated such a decision to "a rule spawning a body of secret law."

The extraordinary impact the indiscriminate use of unpublished opinions can have on the rule of law and the due process rights of litigants is shockingly demonstrated by two decisions issued by the Fifth Circuit on two consecutive days in 1999. Two Texas inmates were to be executed one day apart. One inmate's lawyers obtained a

stay based upon allegations that the state's clemency proceedings were unconstitutional. Upon obtaining the stay, the lawyers advised the second inmate's attorneys and identical pleadings were filed for the second inmate who also secured a stay. The State appealed both cases to the Fifth Circuit. The inmates raised identical claims using identical pleadings. In one case the court refused to overturn the stay. A different panel on the following day in the second case in an unpublished opinion set aside the stay and permitted the execution to go forward. The panel that issued the unpublished opinion included a footnote stating it was aware that the previous day a different panel had halted an execution on the precise grounds but did not offer an explanation for its decision to reach a different result. *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 344 (5th Cir. 1999), *cert. denied*, 527 U.S. 1017 (1999); David Dow, *Invisible Executions: A Preliminary Analysis Of Publication Rates In Death Penalty Cases In Selected Jurisdictions*, 8 Tex. J. on C.L. & C.R. 149 (2004) (text and citations at FNs 76-78).

The use of unpublished opinions to hide decisions that are contrary to established precedent undermines a litigant's ability to know what the law is or will be as applied to his case. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137 (1803). This declaration of law is authoritative to the extent necessary for the decision, and it must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991). These principles, which form the doctrine of precedent, were well established at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the Courts by Article III of the

Constitution. Fifth Circuit Rule 47.5 and similar such rules found in other Circuits, insofar as they allow for the avoidance of the precedential effect of prior decisions, expand judicial power beyond the bounds of Article III, and are therefore unconstitutional.

In the instant case, the Fifth Circuit improperly and unconstitutionally used Rule 47.5 to free itself from its duty to follow its decision in *Aerodex*. The undeniably precedential published opinion issued by the Fifth Circuit in *Aerodex* preceded the panel's unpublished opinion in which the panel did not so much as note the existence of *Aerodex* and issued a ruling on the issue of FCA liability regarding knowingly billing for non-conforming goods and Governmental knowledge that is 180 degrees from the binding precedent of *Aerodex*. Because the Fifth Circuit panel has ignored the rule of law and the mandatory nature of *stare decisis* to Petitioner's detriment, the Fifth Circuit exceeded its Article III powers and denied Petitioner due process of law. Accordingly, this Court should grant *certiorari* to address this important issue of federal law that has not been, but should be settled by this Court in order to preserve the rule of law and to prohibit deprivation of important constitutional rights.

D. This Petition For Writ Of Certiorari Involves A Question Of Exceptional Importance Because By Basing Its Decision On Affidavits Illegally Obtained In Violation Of The Touhy Regulations, The Court Of Appeals Effectively Overturned Those Regulations Which Are Of Paramount Importance To The Smooth Functioning Of The Federal Government And In Doing So Deprived Petitioner Of Due Process Of Law.

Although the Fifth Circuit did not identify it as such, the primary evidence upon which it relied to affirm the

grant of summary judgment to both Respondents, was the affidavit testimony offered by Respondents of two former Army officers, Paul Dronka and Kenneth Dobeck. It is undisputed that these affidavits were obtained by S&S in violation of the Department of Defense "Touhy Regulations," 32 C.F.R. § 97.[6]

The Regulation provides:

> DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in § 97.6(a) may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States.

32 C.F.R. § 97.6(e). The Touhy Regulations apply to both present and former military personnel. 32 C.F.R. §§ 97.2 and 97.3. The Department of Defense Touhy Regulations require a litigant seeking testimony from those to whom the Touhy Regulations apply, to "set out in writing and with as much specificity as possible, the nature and relevance of the official information sought." 32 C.F.R. § 97.6(c)(2). Under the Touhy Regulations past and present Department of

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[6] "Touhy Regulations" are enacted by the various federal agencies pursuant to the Federal Housekeeping Statute, 5 U.S.C. § 301. They are derived from this Court's decision that recognized the authority of heads of Government agencies to restrict testimony of their subordinates and control the efficient use of Government resources. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951).

Defense personnel are prohibited from producing, disclosing, releasing, commenting upon, or otherwise testifying about any matter not specified by a litigant in the written Touhy Regulations request and properly approved by the appropriate Department of Defense official. 32 C.F.R. § 97.6(c)(2).

Because Respondents failed to comply with the Touhy Regulations, Petitioner filed a motion to strike the affidavits and to exclude the testimony of Dronka and Dobeck. The United States also filed a motion as *Amicus Curiae* seeking to strike the affidavits and to exclude the testimony.

In its motion to strike, the United States asserted that the Touhy Regulations protect an important Governmental interest which had been circumvented by the Respondents. *See United States ex rel. Lamers v. City of Green Bay*, 924 F. Supp. 96 (E.D. Wis. 1996) (holding that, in a *qui tam* case where the Government had declined to intervene, litigant was required to comply with Touhy regulation in order to obtain testimony from Government witnesses).

In rendering its decision, the district court refrained from citing the Dronka and Dobeck affidavits and pronounced the pending motion to strike moot. Appendix A-11-29.

Nevertheless, on appeal, the Fifth Circuit relied almost exclusively on the Dronka and Dobeck affidavits (without attribution) in holding that there were no FCA violations. The offending affidavits were the sole basis for the Fifth Circuit's conclusion that the Army was responsible for inspecting the FMTVs, was made aware of the corrosion problems on the FMTVs, and had negotiated

modifications of the contract with S&S.[7] Because these affidavits were obtained in violation of the Touhy Regulations, they should not have been considered by the Fifth Circuit. If the Fifth Circuit's decision is allowed to stand, the Touhy Regulations will in effect be overturned since parties will be left free to disregard the restrictions of these regulations with impunity.

Requiring compliance with the Touhy Regulations assures that the Government is aware of the fact that its employees (including former employees) are being asked to testify regarding official government business, and allows the Government to evaluate the Government's interest, to participate in any court proceedings regarding production of the testimony and to participate in any interview or deposition of the witnesses. Because the Touhy Regulations were not followed, the Government was denied this important right in this matter.

Petitioner's rights were also trampled by the Touhy Regulation violations. Had S&S followed the Touhy Regulations, notice would have been given to Petitioner that

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[7] As discussed in Section B, *supra*, Government knowledge is not a defense to FCA claims when, as here, it is incomplete; comes too late in the process; and is possessed only by the contracting officers. *Varljen*, 250 F.3d at 430; *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 920 (4th Cir. 2003); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002). A Government knowledge defense has no application in the instant case where thousands of nonconforming FMTVs were produced before the Government became aware of the serious corrosion problem or Respondents' non-compliance with other contract specifications and quality standards. *Varljen*, 250 F.3d at 430. Moreover, the Government's acceptance of material or equipment or waiving its right to inspect goods does not relieve the contractor of responsibility for furnishing equipment meeting all the contract specifications. *Varljen*, 250 F.3d at 430.

Dronka and Dobeck were being interviewed. Petitioner could have then sought to interview or depose the affiants who purported to but did not in reality speak for the Government in this matter. Because Petitioner was deprived of this notification by the unlawful method by which the affidavits were obtained, Petitioner was deprived of the opportunity to cross-examine these witnesses. Thus, the failure of the Fifth Circuit to insist upon compliance with the Touhy Regulations deprived Petitioner of his right to due process under the United States Constitution.

This Court should grant *certiorari* to ensure that proper guidance is given by the Court to the lower courts, to federal employees covered by the Touhy Regulations and to litigants regarding this important area of the law.

E. The Fifth Circuit's Holding That MBC Did Not Cause A Prime Contractor To Submit A False Claim To The Government Conflicts With This Court's Decisions And Decisions Of Other Circuit Courts Of Appeals.

Despite the Fifth Circuit's acknowledgment that the FMTVs failed to conform to contractual specifications, the Fifth Circuit held that S&S's subcontractor, MBC, could not be held liable even though it (1) tendered nonconforming FMTV cabs to S&S, the Government's contractor, for payment and (2) submitted invoices to S&S that contained false express certificates of conformance with contractual specifications. The Fifth Circuit's holding conflicts with the teachings of this Court and other Courts of Appeals and the express language of the FCA, all of which confirm that where, as here, the Government reimburses a contractor for a claim made to the Government by the contractor, a subcontractor will be held liable

for its fraudulent claim to the contractor that ultimately led to the contractor's claim to the Government.[8]

The FCA's express language makes it clear that by billing the Government's prime contractor, S&S, the subcontractor, MBC, presented claims that subjected it to FCA liability. The FCA definition of a "claim" includes:

> any request or demand, whether under a contract or otherwise, for money or property which is *made to a contractor*, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property demanded.

31 U.S.C. § 3729(c) (emphasis added).

This Court in *United States v. Bornstein*, 423 U.S. 303, 309 (1976) held that FCA liability exists even though a subcontractor has not directly billed the Government. *Accord*, *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953).

Under the Fifth Circuit's holding, FCA liability could only be found if the fraudulent claim were transmitted to the Government. Given typical procurement practice, where subcontractors invoice the prime contractor who then reinvoices the Government, such a holding would effectively insulate virtually all subcontractors who engage in procurement fraud against the Government. This narrow view of the FCA was expressly rejected by the

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[8] As discussed *supra*, as it pertains to MBC, the Fifth Circuit's holding also conflicts with the decisions of other Courts of Appeals which would impose liability on MBC for the mere tendering of nonconforming goods for payment in a Government procurement contract even in the absence of a false certification.

D.C. Circuit in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004), *cert. denied*, ___ U.S. ___, 125 S.Ct. 2257 (2005). As recognized by then Judge Roberts, FCA liability will result from a fraudulent claim that results in an innocent party submitting a subsequent claim for reimbursement to the Government. *Id.* at 493.

In finding that MBC did not violate the FCA, the Fifth Circuit rejected the holding in both *Bornstein* and *Totten*. *See also, United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943). These important holdings of this Court are greatly undermined by the Fifth Circuit's opinion.

The summary judgment evidence in this case demonstrated that MBC failed to conform its manufacturing process to the Army's contractual requirements. MBC knew from day one of the contract that its manufacturing processes were insufficient to achieve the required ten year corrosion-free service life or to successfully pass the mandatory ACT. When confronted by S&S after it had manufactured thousands of cabs that had been used in thousands of FMTVs, MBC advised S&S that:

> The fact that our contractual requirements may not allow Stewart & Stevenson to meet its contractual requirement [with the Government] may indeed be unfortunate. . . . It may be found that our system may not be able to meet the performance standards that the government requires of Stewart & Stevenson. . . . In summary, we believe that product changes are necessary to reach the corrosion resistance requirements that the government needs. Our paint system is probably not capable of providing a coating better than what has been previously supplied.

Appendix A-35-37.

Nonetheless, MBC according to its President and Vice President instituted no change in its processes after

submission of the final corrosion report until such time as the cabs were manufactured out of galvanized steel. Despite its knowledge that the cabs it was producing for incorporation into the FMTV's that S&S was manufacturing and delivering to the Army did not meet the non-corrosion specifications of the Army's contract with S&S, MBC continuously delivered to and billed S&S for the non-conforming FMTV cabs. This activity conclusively establishes MBC's FCA liability for its "knowing" presentation of false claims.

Moreover, despite its knowledge that the cabs it was delivering to S&S for incorporation into the FMTV vehicles S&S was producing did not meet the non-corrosion specifications of the Army contract, MBC expressly certified to S&S that its cabs were in compliance. Appendix A-31-32.

MBC's repeated failure to inform the Government that the cabs it invoiced and delivered to S&S were incapable of meeting the contractually mandated ten year corrosion-free service life specification were "knowing" presentations of false claims. This Court should grant *certiorari* to correct the Fifth Circuit's rejection of the precedents of this Court and to resolve the conflict between the Circuits regarding subcontractor liability under the FCA.

F. The Fifth Circuit's Dismissal Of Petitioner's Appeal Of The District Court's Award Of Costs Violates This Court's Long Standing Rule That An Award Of Costs Is Not Independently Appealable And Conflicts With The Seventh Circuit's Express Holding, Under Identical Facts, That Petitioner's Appeal Of The Merits Of His Case "Carried With It" The Appeal Of Costs Awarded By The District Court.

Following the district court's entry of final judgment on February 2, 2004, S&S filed a Bill of Costs with the

district clerk. The district clerk signed the Bill of Costs on February 18, 2004. Appendix A-39-40. The clerk's order recited: "Costs are taxed in the amount of $45,099.41 *and included in the judgment.*" (Emphasis added.) Appendix A-40. On February 27, 2004, Petitioner filed a motion to review the costs taxed by the district clerk. On March 1, 2005, prior to any ruling by the district court, Petitioner filed a Notice of Appeal "from the Final Judgment entered in this action on the 2nd day of February, 2004." Thereafter, on April 7, 2004 the district court granted in part and denied in part Petitioner's motion to review the costs taxed by the district clerk. Petitioner did not file a second notice of appeal.

Although the parties briefed the issues relating to the amount of costs awarded by the district court, the Fifth Circuit dismissed Petitioner's appeal of the costs awarded on the basis of lack of jurisdiction. Appendix A-10. The only authority cited for this proposition was *Pope v. MCI Telecomm. Corp*, 937 F.2d 258, 266-67 (5th Cir. 1991), *cert. denied*, 504 U.S. 916 (1992). *Pope*, however did not involve an appeal solely from the award of costs; rather it involved the appeal of a post-judgment award of *attorneys' fees.* In fact, the only other Court of Appeals to reach the issue present in this case, concluded properly that it had jurisdiction to consider the appellant's appeal of a district court's order reviewing the taxing of costs by the clerk and entered after the underlying judgment had been appealed without the necessity of the appellant's filing a second notice of appeal. *Swalley v. Addressograph-Multigraph Corporation*, 168 F.2d 585, 587 (7th Cir. 1948), *cert. denied*, 335 U.S. 911 (1949).

In 1980, the Seventh Circuit had the occasion to revisit *Swalley* in *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980). At issue in *Terket* was whether the Seventh Circuit had jurisdiction over the appeal of a post-judgment award

of attorneys' fees entered after the underlying judgment had been appealed where the appellant had not filed a second notice of appeal following the district court's award of attorneys' fees. The Seventh Circuit held it did not have jurisdiction over the appeal of the award of attorneys' fees, and in the course of its opinion pointed out the crucial distinction between the appealability of a post-judgment award of costs and a post-judgment award of attorneys' fees.

> The rule in Swalley does not necessarily apply to attorneys' fees, however. As the courts have noted, the decision to award attorneys' fees under §1988 is different from the routine assessment of costs normally made by the court clerk.

623 F.2d at 33. It is not surprising that there is a paucity of case law on the precise issue decided by *Swalley* and at issue in the case. Until the conflict among the Courts of Appeals created by the Fifth Circuit in this case, it would have been natural to assume that this issue was settled given the holding of this Court in *Newton v. Consolidated Gas Co. of New York*, 265 U.S. 78 (1924) that:

> When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions *alone* are not allowed.

Id. at 83 (emphasis added). The Fifth Circuit's dismissal of Petitioner's appeal of the district court's order reviewing and modifying the costs awarded by the district clerk does violence to the long standing principle established by the Seventh Circuit in *Swalley* that the appeal of a district court's award of costs relates back to the underlying appealed judgment and becomes a part of it.

This Court should grant *certiorari* to resolve the conflict that now exists between the Circuits on this issue that has widespread significance to practice in the federal courts.

Respectfully submitted,

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November 2005

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-20209

United States of America, ex rel.,
WERNER STEBNER,

Plaintiff-Appellant,

versus

STEWART & STEPHENSON
SERVICES, INC.; MCLAUGHLIN BODY CO.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(4:96-CV-3363)

(Filed August 8, 2005)

Before KING, Chief Judge, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

For this action under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, Relator Werner Stebner challenges: (1) the summary judgment awarded Stewart & Stevenson Services, Inc. (S&S), and McLaughlin Body Co. (MBC); and (2) the costs awarded S&S.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Concerning the summary judgment, Stebner contends the defendants submitted false and fraudulent claims to the United States during the course of a military contract. The judgment is **AFFIRMED;** the appeal from the costs-award, **DISMISSED.**

I.

In 1991, the Government contracted with S&S to build a Family of Medium Tactical Vehicles (FMTV); they were a variety of models of two-and-a-half ton to five-ton military trucks (cargo, dump, tractor, and wrecker) with enclosed cabs. S&S contracted with MBC to produce the cabs. From 1993 until 1998, S&S produced FMTVs under the relevant contracts. (The Government has since awarded S&S two more FMTV contracts.) One specification requires that FMTVs be free of corrosion during the first ten years of use. To monitor the FMTVs' production, the Government established a Defense Plant Representative Office (DPRO) adjacent to S&S's Sealy, Texas, manufacturing plant. Approximately 30 Government personnel were assigned to that DPRO: contract specialists helped administer the contract and oversaw any modifications or revisions; property specialists maintained FMTVs delivered and stored in Sealy; and quality assurance specialists audited and monitored manufacturing processes and assembly of the vehicles and conducted 100% vehicle inspection and testing.

Contract payment was conducted as follows. S&S submitted monthly progress payments for up to 85% of its costs for producing FMTVs that month. Upon conditional acceptance of a vehicle, S&S invoiced the Government for 90% of its total contract price, from which the Government

deducted the 85% attributable to the progress payment. Upon final acceptance, the Government paid S&S the balance. Progress-payment invoices were submitted on Government Standard Form 1443, which contained a certification that the costs reflected on the form were actually incurred by S&S or would be incurred. The vehicle-acceptance documents included Government form DD250 ("Material Inspection and Receiving Report"), the Vehicle Inspection Record, and the Final Inspection Record. The on-site Government officials reviewed and completed these forms and inspected the FMTVs. Upon the Government's being satisfied with a vehicle, its representative signed the DD250, indicating conditional or final acceptance. All documents were then returned to S&S which converted the DD250 into an invoice and submitted it for payment. The DD250 contained no express certifications of contractual compliance. (Only Government officials' signatures appeared on the DD250.)

The Government accepted the FMTVs in stages; acceptance of produced vehicles was conditional prior to the Government's granting First Article Approval (FAA) for full-scale production. Vehicles presented to the Government for conditional acceptance were stored in a Government-controlled area at the Sealy plant until FAA was granted. It was not granted until the vehicle design passed a series of tests; the test results informed design modifications. During the life of the contract, the Government and S&S agreed to numerous amendments which specified needed vehicle modifications suggested by the various test results. Conditionally-accepted vehicles not in accordance with the final design were retrofitted to conform, then re-submitted for approval.

After a final design was agreed upon in 1995, S&S began retrofitting the conditionally-accepted vehicles. During the retrofit, S&S found corrosion problems on the cabs and cargo beds of many of the vehicles. S&S informed the Government immediately. In response, on 19 January 1996, S&S and the Government negotiated modifications, which, *inter alia*, required S&S to: produce a Cab Corrosion Report disclosing the corrosion's "root cause"; repair vehicles that had certain corrosion levels; and refrain from submitting for acceptance vehicles with severe corrosion. The modifications allowed S&S to submit certain vehicles for acceptance but allowed the Government to withhold up to $2,000 per conditionally-accepted vehicle.

At around the same time, the FMTV was being subjected to the contractually-mandated Accelerated Corrosion Test (ACT), which simulated the required ten-years of corrosion-free use. The tested vehicle failed the ACT. Because the vehicles' cabs, manufactured by MBC, exhibited most of the corrosion, S&S and Government inspectors began investigating MBC's production facility and processes. Stebner, as the S&S employee in charge of the Cab Corrosion Report, also inspected the FMTVs and MBC's facility. He found internal and external cab corrosion on the vehicles; blamed inadequacies at MBC's production facility and its use of faulty products and sealing procedures; and concluded MBC's corrosion-prevention coating product and processes did not conform to contractual requirements and produced "junk".

S&S instructed Stebner not to include the totality of his assessment in the Cab Corrosion Report, but to say the systems were only bad "some of the time". Stebner refused, and was removed from the project. In any event, the Government was aware of the conditions at MBC's

facilities; officials from both DPRO and other Government offices inspected the facilities and determined MBC's processes were inadequate. The Government also knew of other possible sources of corrosion, such as faulty windshield seals. The Cab Corrosion Report was presented to the Government on 2 April 1996.

Approximately six months later, after two retrofitted vehicles failed testing for the negotiated corrosion-repair, the Government suspended conditional acceptance of any vehicles evidencing corrosion or which had undergone corrosion repair. After further negotiations, the Government and S&S agreed on two contract modifications. The Government would resume acceptance if S&S: (1) provided a ten-year corrosion warranty, capped at $10 million, on vehicles already manufactured or being manufactured (entered November 1996); and (2) modified the contract to provide fully galvanized cabs (entered March 1997). The Government agreed to increase the price for the galvanized-cab vehicles because it believed galvanization would extend the vehicles' corrosion-free life-span past the contracted-for ten years. The Government considered these two modifications the "final resolution of the corrosion problems".

Pursuant to the False Claims Act (FCA), Stebner filed this action under seal on 8 October 1996, after the Government suspended all acceptance but before the corrosion settlement was reached. In his 19 March 1997 second amended complaint, Stebner claimed S&S and MBC made false representations and certifications to the Government with intent to defraud and made "misleading minimization in reports to the Government of known systemic problems in the coating and cleaning process of the FMTV". This action was stayed pending appellate review of ***United***

States ex rel. Riley v. St. Luke's Episcopal Church, 982 F.Supp. 1261 (S.D. Tex. 1997) (individuals lack standing to file FCA claims on behalf of the United States); was administratively closed in November 1997; but was reopened on Stebner's 1 June 2000 motion, following the Supreme Court's decision in ***Vermont Agency of Natural Res. v. United States ex rel. Stevens***, 529 U.S. 765 (2000) (individuals have standing to file FCA claims on behalf of the United States). On 29 August 2000, the Government elected *not* to intervene in this action.

In 2001, the district court granted S&S's motion to dismiss for failure to state a claim, following our precedent in ***Riley***, 196 F.3d 514 (5th Cir. 1999) (*qui tam* provisions of FCA unconstitutional). ***United States ex rel. Stebner v. Stewart & Stevenson***, No. H-96-3363 (S.D. Tex. 13 March 2001) (unpublished). After a different result was reached for ***Riley*** in *en banc* proceedings, *see* ***Riley***, 252 F.3d 749 (5th Cir. 2001) (en banc), our court summarily vacated the district court decision in this action and remanded. *See* ***United States ex rel. Stebner v. Stewart & Stevenson***, No. 01-20272 (5th Cir. 2 July 2001) (unpublished).

On remand, the parties filed cross-motions for summary judgment. S&S contended: (1) it submitted no false claims within the meaning of the FCA; (2) the Government's knowledge of the manufacturing processes and corrosion issues precludes any claim of falsity; and (3) Stebner's claims are barred by the contractual resolution of the corrosion problem. S&S and MBC jointly contended the certifications provided by MBC applied only to its contract with S&S, not to compliance with S&S's contract with the Government.

In moving for summary judgment, Stebner contended: S&S filed DD250 and progress payment claims for vehicles it knew did not meet the contract's corrosion standards; MBC violated the FCA by falsely certifying to S&S that the cabs and production processes complied with the contract; and S&S violated the FCA by accepting MBC's false claims.

The district court awarded summary judgment to S&S and MBC, concluding: S&S did not submit false claims, either express or implied, to the Government; and there were no false claims because there was no material misrepresentation to the Government and it received the benefit of the bargain. ***United States ex rel. Stebner v. Stewart & Stevenson***, 305 F.Supp.2d 694 (S.D.Tex.2004).

II.

Stebner challenges the summary judgment and the costs awarded S&S. We address the summary judgment first.

A.

A summary judgment is reviewed *de novo*. *E.g.*, ***GDF Realty Investments, Ltd. v. Norton***, 326 F.3d 622, 627 (5th Cir. 2003), *cert. denied*, 125 S.Ct. 2898 (2005). Such judgment is proper when "there is no genuine issue as to any material fact and . . . the [movant] is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c); *e.g.*, ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323 (1986). All inferences must be drawn in favor of the nonmovant, ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 587-88 (1986); but, "there is no issue for trial unless there is sufficient evidence favoring the

nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted". ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 249-50 (1986) (internal citations omitted).

Stebner asserts violations under the following FCA provisions:

> (a) Liability for certain acts. – Any person who –
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; . . . is liable to the United States Government for a civil penalty. . . .

31 U.S.C. § 3729(a)(1), (a)(2). The FCA defines "claim" as "any request or demand, whether under a contract or otherwise, for money or property". 31 U.S.C. § 3729(c). "It is only those claims for money or property to which a defendant is not entitled that are 'false' for purposes of the False Claims Act." ***United States v. Southland Mgmt. Corp.***, 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc) (citation omitted).

Stebner asserts: the district court interpreted too narrowly the meaning of "claim"; an FCA violation has occurred when, as here, goods do not conform to contractual specifications but invoices are submitted to the Government. Stebner contends the district court failed to analyze sufficiently the summary judgment evidence as to

MBC and erred when it concluded: there was no implied certification in the DD250 or progress reports; MBC's certifications to S&S were not false claims under the FCA; and there can be no false claim where the Government has received the benefit of its bargain.

S&S and MBC respond: Stebner fails to identify any false claims; the Government's contractual resolution with S&S negates any alleged false claims; there was no knowing submission of false claims because the Government was informed of all corrosion problems; and Stebner cannot establish that the claims, if false, were material to the Government's decision to pay.

Based upon our review of the record and the parties' briefs and oral arguments, summary judgment in favor of S&S and MBC was appropriate. The claims S&S submitted to the Government were the progress payment requests and the Government-signed DD250. Neither expressly certified compliance with every provision of the overall contract. Our court has not adopted an implied theory of certification. *See* ***U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.***, 336 F.3d 375, 381-82 (5th Cir. 2003). Even if we were to do so, FCA liability would not attach in this action. The Government was involved in the design, production, testing, and modification of the FMTVs; and S&S and the Government negotiated contract modifications in response to the well-documented corrosion problem. The Government retained, and exercised, its discretion to conditionally accept or refuse to accept FMTVs that did not meet contractual standards; and the DD250 was not signed by the Government until it was ready to accept a vehicle. *See* ***Southland***, 326 F.3d at 675. As a result, S&S's subcontractor, MBC, did not "cause[ ] a prime contractor to submit a false

claim to the Government". ***United States v. Bornstein***, 423 U.S. 303, 309 (1976).

B.

Concerning his challenge to the approximately $ 42,000 in costs awarded S&S, Stebner filed a notice of appeal from the 2 February 2004 judgment on 1 March 2004, after S&S had filed its bill of costs on 17 February and Stebner had filed a motion on 27 February for review of costs. On 7 April, the district court granted S&S's original bill of costs.

That 7 April decision was an independently appealable order. *See* ***Pope v. MCI Telecomm. Corp.***, 937 F.2d 258, 266-67 (5th Cir. 1991). "Where the appellant notices the appeal of a specified judgment only . . . this court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal." ***Id.*** at 266 (internal quotation and citations omitted); Fed. R. App. P. 3(c)(1)(B) (notice of appeal must "designate the judgment, order, or part thereof being appealed"). Stebner's 1 March notice of appeal specifies appeal only from the 2 February judgment. Because he failed to file a supplemental notice of appeal, specifying the 7 April costs-award, we lack jurisdiction to review this issue. *See* ***Pope***, 937 F.2d at 266-67.

III.

For the foregoing reasons, the judgment is **AFFIRMED;** the appeal from the costs-award, **DISMISSED.**

AFFIRMED IN PART; DISMISSED IN PART.

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, ex rel. WERNER STEBNER, *Plaintiff-Relator,*	§	
v.	§	C. A. NO. H-96-3363
STEWART & STEVENSON SERVICES, INC. and MCLAUGHLIN BODY COMPANY, *Defendants.*	§	JURY

MEMORANDUM AND ORDER

(Filed Jan. 30, 2004)

I. INTRODUCTION

This is a *qui tam* action that alleges that the defendants have committed fraud against the United States in violation of the False Claims Act ("FCA"). 31 U.S.C. § 3729 *et seq.* The Court accepts jurisdiction under 28 U.S.C. § 1331. The plaintiff-relator ("relator") is Werner Stebner and the defendants are Stewart & Stevenson Services, Inc. ("S&S") and its subcontractor, McLaughlin Body Company ("MBC"). Pursuant to Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE, the parties have submitted cross motions for summary judgment. The Court has reviewed the papers on file and concludes that the relator's motions for summary judgment on the issue of liability should be

DENIED and the defendants' motions for summary judgment should be GRANTED.

II. HISTORY

In 1991, the Government awarded S&S a contract to produce 10,843 trucks for the Army. The contract required that the trucks be capable of resisting corrosion damage during the initial ten years of service life. To evaluate resistance, the contract required an Accelerated Corrosion Test ("ACT"). In 1995, the ACT revealed corrosion problems. Seeking to establish conditional acceptance criteria while resolving the corrosion issue, S&S and the Government executed the first of several bilateral modifications on January 19, 1996. Modification P00067 called for a root cause analysis and the submission of a corrective action plan. The modification authorized the Government to withhold partial payments while conditionally accepting trucks until S&S submitted and implemented an acceptable corrective action plan. Moreover, it gave the Government the right to cease conditional acceptance if S&S failed to sufficiently resolve the corrosion issue. S&S selected its employee, the relator, to lead the investigation and produce the final corrosion report. Prior to submitting his report, the relator met with S&S managers and Government representatives. His report disclosed that S&S and MBC's facilities were producing "junk" and were incapable of meeting the contract's requirements. The relator and S&S disagreed about the level of detail to include in the final report. S&S subsequently removed the relator from the investigation and reassigned the reporting task. On April 2, 1996, S&S submitted the final corrosion report. It identified more than a dozen potential corrosion causes and it proposed various actions for

corrosion prevention. It did not, as the relator preferred, reveal every deficiency in the production process and each instance of additional corrosion discovered during the investigation.

After testing repairs that were made under the corrective action plan, the Government, on September 25, 1996, exercised its right to cease conditional acceptance. In response, S&S offered a ten-year warranty on repaired trucks if the Government would continue accepting them. Meanwhile, on October 8, 1996, the relator filed an FCA Complaint with this Court under seal; the United States declined to intervene. Accepting S&S's offer, the Government executed Modification P00124 on November 13, 1996. In addition to resuming acceptance, the Government agreed to release all previously withheld funds. Since this event, the Government has awarded S&S two additional contracts for trucks, and the repaired ones remain under warranty against corrosion.

III. PARTY CONTENTIONS

A. Werner Stebner's Argument

The relator contends that S&S violated the FCA by submitting payment claims for trucks supplied under its contract with the Government while failing to ensure complete compliance with the contract's terms. Specifically, the relator contends that S&S submitted DD250 invoices and progress payment requests for trucks known to be incapable of meeting the contract's corrosion resistance requirements. Moreover, the relator contends that S&S's subcontractor, MBC, violated the FCA by falsely certifying to S&S that its products and processes conformed to the Government's contract. Finally, the relator

contends that S&S violated the FCA by accepting MBC's false certifications.

B. S&S and MBC

S&S contends that it submitted no false claims for payment. Supporting this contention, S&S asserts that the DD250 invoices do not certify perfect compliance and that the progress payment invoices reflect manufacturing costs rather than payment for any particular truck. S&S and MBC jointly contend that the certifications provided by MBC were exclusively for S&S. MBC's certifications were not submitted to the Government nor did they impact the Government's payment decisions. S&S further contends that the Government's knowledge of the manufacturing processes and corrosion issues precludes fraud or falsity. Finally, S&S contends that the relator's FCA claim fails because the Government negotiated specific contractual modifications to solve the corrosion issue.

IV. LEGAL STANDARDS

A. Summary Judgment under Rule 56(c)

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In adjudicating a motion for summary judgment, the Court

must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that there is a genuine issue for trial." *Id.* at 324. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry here is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. The case's substantive law identifies the material facts. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of a summary judgment. *Id.*

B. False Claims Act ("FCA")

The FCA, in relevant part, provides:

(a) Liability for certain acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of

> the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; . . .
>
> is liable to the United States Government. . . .

31 U.S.C. § 3729(a)(1), (2).

> For FCA purposes,
>
> 'knowing' and 'knowingly' mean that a person with respect to the information –
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts
>
> in reckless disregard of the truth of falsity of the information, and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b).

FCA liability arises only from the submission of false or fraudulent "claims." Congress has established that a

> 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which

> is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c).

Whether a claim is "false or fraudulent" depends upon the materiality of the alleged falsity or fraudulence at issue. FCA liability does not occur unless the act averred to be false or fraudulent is material to the monetary or property claim submitted to the Government. In fact, FCA liability does not exist if the alleged fraudulent act had no bearing on the Government's payment decision.

V. ANALYSIS

A. S&S submitted no expressly false or fraudulent claims to the Government.

The relator avers that S&S's FCA liability stems from the submission of DD250 invoices and progress payment invoices. The DD250 invoices were payment requests for completed trucks and the progress payment invoices were payment requests for manufacturing cost reimbursements. Such requests for payment fit squarely within the FCA's definition of a 'claim.' *See* 31 U.S.C. § 3729(c). FCA liability, however, requires coinciding falsity or fraudulence. In addition to the delivered quantity, the DD250 invoices included limited information about the trucks such as mechanical specifications and manufacture dates. Verified and signed by a Government contracting officer, each DD250 invoice is prima facie evidence that S&S produced and delivered the product for which payment was requested. The relator has produced no evidence that any

DD250 invoice expressly claimed to deliver something more than what the Government actually received.

Finding evidence of an overt false or fraudulent claim in the progress payment invoices is an equally futile endeavor. The relator contends that these invoices were false or fraudulent claims because they contained express certifications of contract compliance. It is true that each progress payment invoice contains a certification of contractual compliance. Read completely, however, each certification merely represented that S&S complied with the contract's progress payment clause. Nothing in the certification addressed the quality of any particular truck or conformance with any particular production term in the contract. Completing the certification essentially affirmed that the progress payment invoice was true. Each invoice stated the costs that S&S was eligible to receive under the progress payment clause and a computation of the amount that remained for future progress payments. The relator has not demonstrated that an entry on any invoice for progress payments was false or fraudulent. In fact, no evidence suggests that S&S requested a reimbursement for eligible costs that it did not incur. Accordingly, the Court finds that there is no genuine dispute regarding the absence of an express false or fraudulent claim.

B. S&S submitted no implied false or fraudulent claims to the Government.

Considering the conspicuous absence of an express false or fraudulent claim, the relator submits that FCA liability arises from what S&S omitted rather than from what it claimed. Citing *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 200 F.Supp.2d 673 (S.D. Tex. 2002), the relator argues that "implied certification" is a viable theory for

finding FCA liability. In *Riley*, this Court held that certifications may be express or implied. *Riley*, 200 F.Supp.2d at 678. Exercising restraint, however, this Court only considered *Riley's* justiciable issues and did not provide a rubric for identifying implied certifications.

Relying on *BMY-Combat Systems Division of HARSCO Corp. v. United States*, 38 Fed. Cl. 109 (1997), the relator maintains that an implied certification occurs whenever a government contractor submits a DD250 form as an invoice for payment. A review of the court's analysis in *BMY-Combat* plainly belies this assertion.

In *BMY-Combat*, the plaintiff-contractor ("contractor") defended an FCA counter-claim by arguing that "in the absence of falsity on its face, a DD250 form cannot constitute a false claim under the False Claims Act." *Id.* at 124. Distinguishing two of the contractor's supporting cases, the court rejected this contention that, for FCA purposes, DD250 certifications must be express. Comparing *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995), the court held that DD250 forms are claims under the FCA when used as invoices. *Id.* Next, the court contrasted the propriety of identifying express falsity on DD250 forms in criminal cases, which require proof beyond a reasonable doubt, with the burden for finding liability in civil matters. Distinguishing *United States v. Cannon*, 41 F.3d 1462 (11th Cir. 1995), the court held that an "implied representation may be sufficient for a finding of fraud under a preponderance standard." *Id.*

The relator is in error because he failed to appreciate the actual significance of the court's analysis. The court's distinctions demonstrate that DD250 forms become claims when used as invoices and, like other invoices in civil

matters, they may impliedly certify false claims. Regarding whether certifications may be express or implied, *BMY-Combat* advances the ball no further than *Riley*. *BMY-Combat* merely puts DD250 forms on par with other instruments used as invoices. The relator's attempt to elevate DD250 forms above all other invoices by creating a *per se* rule of implied certification is unavailing.

Although it misses the relator's proposed mark, *BMY-Combat* does, however, provide instructive insight into the implied certification issue. In *BMY-Combat*, the contractor agreed to manufacture howitzers for the U.S. Army. The Government accepted DD250 forms as invoices and each expressly required the contractor to identify any contractual deficiencies or nonconformance areas. *BMY-Combat*, 38 Fed. Cl. at 117. The contractor, however, failed to disclose that testing was not performed. Consequently, the court held that this omission was an implied certification for FCA purposes because the lack of testing was a material fact. The court's review indicates that there are at least two prerequisites for establishing that a contractor's invoice contains an implied certification for FCA purposes: (1) the invoice represents that the contractor has disclosed deficiencies or nonconformance areas and (2) the contractor submits the invoice without disclosing a material deficiency or area of nonconformance.

BMY-Combat's path to finding an implied certification reveals a distinction overlooked by the relator but significant to the Court. In the instant matter, the relator asserts that S&S invoiced the Government for vehicles that were manufactured with inferior processes, maintained in a sub-standard environment, and inadequately tested for corrosion resistance. Perhaps acknowledging an inability to predict future performance, the relator avers that these

factors assure corrosion within ten years. Therefore, according to the relator, the vehicles do not conform to the contract's ten-year corrosion resistance requirement. Notwithstanding an apparent lack of ripeness, the relator's argument fails because, in contrast to the contractor in *BMY-Combats*, S&S submitted no invoice with a requirement that it disclose all deficiencies and nonconformance areas. This prong was the bridge that the *BMY-Combat* court used to access its theory of implied certification. Without it, the issue of misrepresenting a material fact never matures. Likewise, without a textual commitment to full disclosure on the invoice, the relator's argument that an implied certification exists falls upon ears that do not hear very well.

C. The FCA requires a knowingly made material misrepresentation.

Throughout his submissions to the Court, the relator has relentlessly argued in favor of applying the square corners rule. This rule binds those who contract with the Government to the letter of their agreements. *U.S. ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 302-304 (6th Cir. 1998). In light of the relator's fervent desire to apply a purely contractual concept to this fraud action, it would be ironic if the measure that he would deal should become the measure that he receives. The difference between the DD250 invoices that S&S submitted and those discussed in *BMY-Combat* turns on one clause. In *BMY-Combat*, each invoice explicitly requires the contractor to identify nonconformance areas. The invoices submitted by S&S, however, merely represent that government representatives have identified nonconformance areas. Following *BMY-Combat's* analysis for finding an implied

certification and the relator's penchant for legalism, this matter should end here. The Federal Rules of Civil Procedure, however, demand more. *See*, FED. R. CIV. P. 1. Fairness endows the issue of whether a material misrepresentation exists with primacy over finding implied or express certifications. In fact, parties should not attempt to split hairs over whether an implied or express certification exists. Arguing opposite sides of the same coin amounts to mere quibble that demeans the severity of a claim that one party has defrauded the Federal Government.

Notwithstanding any additional promises or certifications, a contractor's mere request for full payment inherently represents that he has tendered a complete and conforming performance. In this regard, it was unnecessary for the court in *BMY-Combat* to identify the contractor's specific promise on the DD250 form because any request for full payment represents that the Government has received the benefit of its bargain. Accordingly, this Court holds that a request for full payment becomes a material misrepresentation when the Government does not receive the benefit of its bargain. Indeed, an FCA violation occurs when the contractor 'knowingly' makes a material misrepresentation.

D. S&S made no material misrepresentation because the Government received the benefit of its bargain.

In light of the preceding, the first step in finding an FCA violation must be to establish whether the Government has received the benefit of its bargain. If it has, then no false or fraudulent claim exists and summary judgment for the defendant is appropriate. If not, then a material

misrepresentation has occurred and the court must determine whether the contractor knowingly made the misrepresentation.

It is undisputed that the Government bargained for vehicles that will resist corrosion for ten years. The relator avers, however, that the tendered vehicles do not provide the required protection. Therefore, based upon his assessments of the anti-corrosion test results and vehicle production processes, the relator concludes that the Government has not received the benefit of its bargain. The relator's submission includes evidence that no vehicle successfully completed the contract's accelerated corrosion test requirement. It also includes evidence that vehicle surfaces, as contractually required, were not properly cleansed, treated, and free from foreign matter that might affect corrosion resistance.

At best, the relator's submission on testing reflects a limited probability that some vehicles may need repairs within ten years. The contract, however, contemplates the need for corrosion repairs and requires S&S to provide them at its own expense. Lacking evidence that S&S intends to renege on this warranty, the relator's submission fails to demonstrate nonconformance that deprives the Government of its bargain. This conclusion follows *BMY-Combat* and makes an appropriate distinction. In *BMY-Combat*, the contractor failed to structurally test howitzers supplied to the U.S. Army. It is an understatement to suggest that personnel would be in danger if any cannons imploded on the battlefield. In fact, neither party in *BMY-Combat* disputed that the lack of testing was a material fact. This finding does not exist in the instant matter. Here, S&S argues that it performed adequate testing. Moreover, competent evidence demonstrates that

the testing was merely a means to "evaluate the effectiveness of current designs and materials in preventing corrosion of military vehicles [and to] derive cost data to reflect inspection and repair costs. . . . " Family of Medium Tactical Vehicles ("FMTV") Contract §§ E.47.3-47.3.1. Finally, whether complete testing occurred or not in this matter is a fact that hardly affects the Government's bargain because no one can reasonably suggest that the premature occurrence of rust on a military transport vehicle compares to the material defect associated with untested howitzers.

The Government's bargain is also unaffected by allegations that vehicle surfacing processes were less than perfectly compliant with subjective production quality terms. The Fifth Circuit addressed this issue in *United States v. Southland Management Company*, 326 F.3d 669 (5th Cir. 2003) (*en banc*). In *Southland*, the owners of an apartment complex contracted with the Government to provide housing for low-income residents. The contract provided that the owners would receive housing assistance vouchers in exchange for providing "[d]ecent, [s]afe, and [s]anitary housing." Id. at 672. In its claim, the Government alleged that the owners violated the FCA by submitting vouchers with false certifications of compliance. Rejecting the Government's FCA allegation, the court held that "'[d]ecent, safe, and sanitary' . . . is not precise or measurable." Id. at 675.

In the instant matter, the relator claims that S&S requested payments while failing to ensure compliance with the contract's TT-C-490 and MIL-STD-193K specifications. These terms addressed manufacturing quality and effectively called for proper cleaning, treatment, and protection of all parts from foreign matter that might

affect corrosion resistance. Taken to an extreme, conformity requires that vehicle construction take place in a dustless vacuum. In light of *Southland* and common sense, this Court finds that a subjective propensity renders these terms immaterial to this issue. The Government's concern when it accepted the tendered vehicles was not whether the defendants rinsed every part of every vehicle before each coating application. Its concern was whether it received corrosion resistant vehicles.

Besides illuminating the path to discerning material issues, *BMY-Combat* and *Southland* provide a basis for considering a contractor's willingness to stand by its agreement and the Government's decision to revoke or continue its acceptance. These factors are critical to the determination of whether the Government received the benefit of its bargain. In *BMY-Combat*, it is significant to note that the Government was the defendant in the contractor's suit against it for equitable adjustment. It appears that the Government was willing to work with the contractor to repair defective units. In fact, the Government did not revoke its acceptance until the contractor sought payment for the repairs. *Southland* further establishes this point. In its discussion, the Fifth Circuit considered two aspects of the relationship between the defendant apartment complex owners and the Government. First, when the Government inspected the housing units and found poor conditions, the defendants respected the terms of the contract, accepted responsibility, and implemented various corrective measures. Second, throughout multiple corrective action periods that all ended with marginal success, the Government declined to abate housing assistance payments. Instead, it chose to continue accepting payment requests while working with

the defendants to improve residential living conditions. Ultimately, the United States brought suit and the Fifth Circuit held that no FCA violation occurred because the alleged fraud was within the scope of the contract and the dealings between the parties demonstrated that the defendants were entitled to be paid. *Southland*, 326 F.3d at 676.

The instant matter squarely fits the *Southland* analysis. Moreover, the distinctions in this case demonstrate why the *BMY-Combat* result does not apply. In all three cases, the Government had the opportunity to revoke its acceptance either by abating housing assistance payments or by rejecting conditionally accepted goods. Permanent revocation occurred only in *BMY-Combat*. In fact, it occurred only after the defendant attempted to avoid its remedial obligation. In *Southland* and in the instant matter, the Government withheld its contractual right to permanently revoke acceptance because the defendants made earnest attempts to remedy apparent deficiencies. Finally, the Fifth Circuit's characterization of the Government's continuing decision to accept and pay vouchers as honoring entitled payment requests is consistent with basic contract theory: if one party performs to an extent that the other party receives the benefit of its bargain, then surely the initially performing party is entitled to request and receive payments as provided in the contract.

In *Southland*, the Government's decision to continue working with the defendants demonstrates its belief that the defendants were entitled to the payments and, inherently, that the Government regarded itself as receiving the benefit of its bargain: housing for low-income residents. Likewise, the Government's past and continuing decision

to work with S&S reflects that it regards itself as receiving the benefit of its bargain: vehicles that will resist corrosion for ten years.

Ample evidence demonstrates that the Government's contract with S&S contemplated not only instances of deviation of the nature considered here, but also a working relationship between the parties to implement essential remedies. Specifically, the contract provides, in relevant part, that

> [d]eviation from the prescribed, or agreed upon procedure, or instances of poor practices . . . will immediately be called to the attention of the contractor. Failure of the contractor to promptly correct deficiencies shall be cause for suspension of acceptance until corrective action has been made, . . .
>
> . . . .
>
> Upon completion of the corrosion test, the Government shall evaluate the test results and corrective action(s) proposed by the Contractor. . . . All corrective actions shall be at no cost to the Government.

FMTV Contract §§ 4.1.3, E.47.9. Notwithstanding the relator's averments that vehicles were improperly tested, undisputed evidence shows that S&S conducted appropriate tests and made no attempts to suppress deficiencies. In fact, S&S detailed its shortcomings in a 38-page report containing 36 exhibits that identified more than a dozen possible causes of corrosion. As authorized by the contract, S&S implemented corrective actions at no cost to the Government. One of these actions included making repairs to vehicles that showed corrosion. Like the *Southland*

defendants, S&S experienced failure. When subsequent tests revealed that this corrective measure might not last, the Government exercised its right to suspend acceptance. Although no suspension occurred in *Southland*, the analysis remains consistent because the suspension never matured to a permanent revocation and the Government continued working with S&S.

In addition to providing suspension rights, the Government's contract with S&S provides that "suspension of acceptance will last *until corrective action has been made*, . . . " FMTV Contract § 4.1.3. Prior to this suit, S&S offered to provide a formal ten-year warranty on all repaired vehicles. Affirming that the offer was a bona fide corrective action, the Government resumed its acceptance. Despite the relator's best efforts to maintain his saucy intrusion, the Government and S&S have continued to work together. For instance, modification P00124 called for complete vehicle galvanization. The relator contends that it violated the FCA because S&S requested (and received) an equitable adjustment for it. There is no violation, however, because the modification provides *more* than the Government's original expected benefit. The modification guarantees twenty years of corrosion resistance. Finally, the Government's decision to issue S&S two contract renewals speaks volumes about its level of satisfaction.

Considering the Government's dealings with S&S and relevant precedent, the relator's evidence does not support a finding that the Government failed to receive the benefit of its bargain. Lacking a factual basis to establish that S&S misrepresented a material fact when it sought payment from the Government, the relator has failed to establish the occurrence of a false or fraudulent claim.

Without a false or fraudulent claim, FCA liability, as a matter of law, does not attach to S&S or its subcontractor, MBC.

VI. CONCLUSION

In light of the discussion above, the Court DENIES the relator's motions for summary judgment and GRANTS the defendants' motions for summary judgment. All other motions are moot.

It is so ORDERED.

Signed this 30th day of January, 2004.

/s/

KENNETH M. HOYT
United States District
Judge

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, ex rel. WERNER STEBNER, *Plaintiff-Relator*,	§	
v.	§	C. A. NO. H-96-3363
STEWART & STEVENSON SERVICES, INC. and MCLAUGHLIN BODY COMPANY,	§	JURY
Defendants.	§	

FINAL JUDGMENT

Pursuant to the memorandum and order entered in this case, the plaintiff-relator shall take nothing in its suit.

This is a Final Judgment.

Signed this 30th day of January, 2004.

/s/ _____
KENNETH M. HOYT
United States District Judge

McLAUGHLIN
McLAUGHLIN BODY COMPANY –
Government Products Division
350 – 44th STREET, ROCK ISLAND, ILLINOIS 61201
FAX: 309-788-7109 PHONE: 309-762-7755

Date: 20 SEPT 1995

NOTE: The 6101, or inspection document, is an extension of the C of C in that those items called out on the inspection document become a part of the C of C.

Prime Contract No.: DAAE07-92-C-R001
(Sub.) Contract No.: 202, 249-00

P.O. Number 203,249 Rev. 00

Part Number 12414744 Rev. X0

Nomenclature Std. Cab Body/With Doors/Roof Hatch

Lot/Shipment (Traceable to Inspection Report) LOT 337

Heat/Lot Traceability (If Applicable) N/A

Quantity 8

Age Control Expiration Date (If Applicable) N/A

Cure Date N/A

Declaration of Material (When options are Specified.)

Material: Verification of material is kept on file at McLaughlin Body Company. These Units are 383 Green

C of C applies to : MIL-STD-1261A; MIL-W-12332A; GM-9984070; MIL-C-46168; TT-C-490; MIL-R-46164; MIL-STD-130; MIL-C-53039 and MIL-STD-193K; MIL-P-46105

"The undersigned, individually, and as the authorized representative of the contractor, warrants and represents that: All the information supplied above is true and

accurate; the material covered by this certificate conforms to all contract requirements (including, but not limited to the drawings and specifications; the analyses appearing herein are true and accurate analysis: And this certificate is made for the purpose of inducing payment and with knowledge that the information and certification may be used as a basis for such payment."

Authorized Signature: /s/ Thomas A Hanesworth
Thomas A Hanesworth
Title: Quality Services Ass't Manager

[Illegible] Hauser

From:	Ray Romo
To:	Al Strange; Richard Borne; Mike Hauser; Jim West; Ken Kunard; Gus Krause; Kathy Nunn
Cc:	Willie Bannister; Russ Frey; Russell Hankins; Jim Muldoon; David Rosen; Mike Scanlin; Bret Trader; Charlie Verm; Phil Williams
Subject:	CAB CORROSION
Date:	Friday, August 25, 1995 12:57PM

Gus, please inform Jim Brainard of this memo.

Lady and Gentlemen;

After the teardown of the cab P/N 12414744RA was completed, it was noticed that the cab possesses a SERIOUS, SERIOUS corrosion problem.

Directly below the center (top) marker lights and under the windshield seal is the MOST evident, and on the flange on the passenger (under) side in the engine housing compartment was the other location where paint flaking/ rust exists.

This problem, MUST be addressed at all levels and the appropriate corrective action needs to be taken to prevent the cabs from rusting in our lot PRIOR to shipment! ! !

Kathy, when is the next scheduled date for McLAUGHLIN to be at Sealy, TVS?

This cab is directly outside the MFG. services, Al Strange, office if you care to see it?

For any questions, comments or concerns please contact me, Ray at extension 1574.

Thank you,

Ray R. Romo

McLAUGHLIN
McLAUGHLIN BODY COMPANY –
2430 – 3RD AVENUE, MOLINE, ILLINOIS 61265
FAX: 309-762-2823 PHONE: 309-762-7755

February 16, 1996

Mr. LaRoy Hammer
Vice President, Tactical Vehicles
Stewart & Stevenson
5000 I-10 West
Sealy, Texas 77474

Dear LaRoy:

During our meeting last Saturday in your conference room, you asked for a combined effort by McLaughlin Body and Stewart & Stevenson to move forward to resolve the corrosion issue on cabs. You asked how committed McLaughlin is toward that goal. This letter is written in response to your comments and questions.

The contract that we have with Stewart & Stevenson requires that our coatings meet 336 salt spray hours, 150 mg/sq. ft. minimum phosphate coating weights on test panels, cross hatch adhesion tests on cabs and some other criteria as related to government specifications. McLaughlin Body Company does not have the obligation of meeting a ten year corrosion requirement. Lab sample test comparisons to what a long term corrosion resistant coating should be does not address whether we have met our contract with Stewart & Stevenson. The fact that our contractual requirements may not allow Stewart & Stevenson to meet its requirements may indeed be unfortunate.

Our opinion is that Stewart and Stevenson is selectively using laboratory results to show that our phosphate

coating is inferior and not uniform. By taking the course to prove that our paint system does not adequately clean and phosphate (and is the root cause for corrosion) Stewart & Stevenson is not giving itself the opportunity to remain impartial and thus recognize other reasons for corrosion. When it is established that we have met our contract with Stewart & Stevenson and are not the root cause, it will be extremely difficult for you to change the thoughts that have been previously supplied to the government representatives.

Our practice of using a Stewart & Stevenson approved repair procedure to re-apply paint coatings after grinding the E-coat and phosphate away is one reason for corrosion. If we had not repaired, if there were not airborne contaminants, if drip rails and weld seams were sealed differently, if water were not retained under the windshield rubber and if galvanized metal was used where required; you would not be facing these problems. Our opinion is that there are environmental and product design problems that are also causing the corrosion.

McLaughlin Body Company has reacted to concerns and recommendations since we were made aware of the corrosion problems. We have actively tried to find problems in how we have managed our system or in how our chemicals have performed. We have found that we have met all required tests for over eight (8) years of military cab production, those records are on file, and coating suppliers specifications have been met.

It may be found that our system may not be able to meet the performance standards that the government requires of Stewart & Stevenson. Regardless of how that may turn out, we believe that changes should be made to the cabs;

galvanized metal should be selectively used (if not used 100%), weld seams and drip rails should be sealed after E-coat and prior to top coat, weld through sealer should be replaced with a zinc rich material and the windshield rubber and other seals should be changed to not retain water. Also, a thorough examination needs to be made to see if the soap used in the windshield assembly has corrosive properties and if there is presence of calcium chloride or ammonium sulfate in your plant soil or surrounding soil which could get on the trucks.

In December we volunteered to participate in the corrosion repairs which are necessary due to our prior repair activities which did not include a conversion coating. No one has ever responded to numerous attempts by us to see how we could participate. We offered to send people and equipment to your plant. Should Stewart & Stevenson believe that current repair expenses or any other expenses are the responsibility of McLaughlin Body Company, we all need to understand that McLaughlin approvals need to be gained in advance.

In summary, we believe that product changes are necessary to reach the corrosion resistance requirements that the government needs. Our paint system is probably not capable of providing a coating better than what has been previously supplied. While we look forward to resuming production, the misleading and damaging reports already provided in your interim report may prohibit that. Through everything, past and present, we believe our paint system has met what our contract with Stewart & Stevenson expects of it.

You can be assured that we also want to complete 80,000 cabs and stand ready to support your efforts as we can.

Sincerely,

/s/ Bud Pierce
E.F. Pierce
President

EFP/g

United States District Court

Southern District of Texas

United States ex rel. Stebner

V.

Stewart & Stevenson Services, Inc., et al.

BILL OF COSTS

Case Number: H-96-3363

(Filed Feb. 17, 2004)

Judgment having been entered in the above entitled action on 2/2/2004 against Plaintiff-Relator Werner Stebner,
Date
the Clerk is requested to tax the following as costs:

Fees of the Clerk	
Fees for service of summons and subpoena	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	$14,184.34
Fees and disbursements for printing	
Fees for witnesses (itemize on reverse side)	
Fees for exemplification and copies of papers necessarily obtained for use in the case	$30,915.07
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
Other costs (please itemize)	
TOTAL	$45,099.41

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to: Stuart M. Nelkin; Nelkin & Nelkin, P.C.; 5417 Chaucer; Houston, Texas 77005.

Signature of Attorney: Daniel M. McClure

Name of Attorney: Daniel M. McClure

For: Stewart and Stevenson Services, Inc.
Name of Claiming Party

Date: Feb. 17, 2004

Costs are taxed in the amount of $45,099.41 and included in the judgment.

Michael N. Milby
Clerk of Court

By: /s/ Kathy [Illegible]
Deputy Clerk

2-18-04
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, ex rel. WERNER STEBNER,	§	
Plaintiff and Plaintiff-Relator,	§	CIVIL ACTION
v.	§	NO. H-96-3363
STEWART & STEVENSON SERVICES, INC. and McLAUGHLIN BODY COMPANY,	§	
Defendants.	§	

NOTICE OF APPEAL

(Filed Mar. 1, 2004)

Notice is hereby given that WERNER STEBNER, Plaintiff-Relator in the above-named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on the 2nd day of February, 2004.

Respectfully submitted,

/s/ Stuart M. Nelkin
Stuart M. Nelkin
State Bar No. 14884000
Carol Nelkin
State Bar No. 14883500
P. O. Box 25303
Houston, Texas 77265
(713) 526-4500 (tel)
(713) 526-8915 (fax)

/s/ Bertrand C. Moser
Bertrand C. Moser
State Bar No. 14572000
5417 Chaucer
Houston, Texas 77005
(713) 807-7455 (tel)
(713) 526-8915 (fax)

ATTORNEYS FOR PLAINTIFF AND PLAINTIFF-RELATOR

OF COUNSEL:
NELKIN & NELKIN, P.C.